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No. 10-178

Supreme Court, U.S.
FILED
SEP 21 2010
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IN THE

Supreme Court of the United States

SHAWN M. LOCKETT, ET UX.,

Petitioners

v.

CITY OF NEW ORLEANS, LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition when there is no issue of fact relevant to the issue of whether the Defendants had probable cause to stop and arrest Petitioner under the Fifth Circuit's application of *Atwater v. Cityof Lago Vista*, 532 U.S. 318 (2001) and afforded the Defendants immunity?

2. Whether Petitioners have presented a compelling reason to grant thc Petition when Petitioners' statc law false arrest claims were dismissed as a matter of law on the same qualified immunity basis as Petitioners' civil rights claims?

3. Whether Petitioners have presented a compelling reason to grant the Petition when Petitioners' claim of excessive force was dismissed as a matter of law and the ruling is wholly consistent with the rulings of this Court and the Fifth Circuit itself?

4. Whether Petitioners have presented a compelling reason to grant the Petition when Petitioners' claims under 42 U.S.C. §§ 1985 and 1986 are not supported by facts sufficient to demonstrate a conspiracy to deprive them of equal protection?

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STATEMENT OF THE CASE

The Fifth Circuit's application of the principles of *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), in the instant case does not widen the door for potential abuse by law enforcement as argued by Petitioners. It is only Petitioners' self-serving testimony that creates contradiction of facts. Even when accepting all facts set forth by Petitioners as true, the finding of probable cause and the entitlement of the officers to qualified immunity is sound. The Fifth Circuit's ruling in no way compromises the protections afforded by the Fourth Amendment, nor does it render the citizens invoking its protections powerless.

A. Factual Background

Shawn M. Lockett (individually referred to herein as "Lockett") and his wife, Melanie Lockett (collectively referred to herein as "Petitioners") sued Governor Bobby Jindal in his official capacity, Officer Joseph Thomas ("Thomas") individually and in his official capacity as a Southern University New Orleans ("SUNO") campus police officer, Master Sergeant Christopher Ahner ("Ahner") individually and in his capacity as a Military Policeman ("MP") of the Louisiana Air National Guard, Specialist Jonathan Bieber ("Bieber") individually and in his capacity as a MP of the Louisiana Army National Guard and Sergeant Brandt Arceneaux ("Arceneaux") individually and in his capacity as a MP of the Louisiana Army National Guard. The above Defendants will collectively be referred to herein as the "State Defendants and/or Respondents". At all material times herein Ahner, Bieber and

Arceneaux were serving in the active service of the State of Louisiana by order of the Governor.

Petitioners also sued Ray Nagin, in his official capacity as Mayor of New Orleans, Superintendent Warren Riley, in his official capacity as Superintendent of the New Orleans Police Department, Lieutenant Lynn Fletcher ("Fletcher"), individually and in his official capacity as a Lieutenant in the New Orleans Police Department, Reginald Gains ("Gains"), individually and in his official capacity as a New Orleans Police Officer, and Tocka Clark ("Clark"), individually and in her official capacity as a New Orleans Police Officer. All Defendants when referenced herein will collectively be referred to as "Defendants."

The facts of this case are set forth in detail by the District Court and the Fifth Circuit. The Courts' findings relative to material facts not in dispute are uncontroverted by Petitioners.

B. Proceedings Below

Petitioners correctly set forth the history of the proceedings below.

However, the State Defendants feel compelled to correct Petitioners' mischaracterization of the basis of the Fifth Circuit's holding which sustained the District Court's finding of probable cause. The Fifth Circuit held that there was no genuine issue of material fact with respect to whether the Defendants had probable cause to believe that Lockett was speeding. The Fifth Circuit partially based its holding on a concession contained in Petitioners' appeal brief.

Petitioners argue that the Fifth Circuit's holding was incorrect and that Petitioners did not concede probable cause for the initial stop in their brief. Specifically, Petitioners argue in a footnote that the Fifth Circuit relied in part on a quote from Petitioners' brief. The statement on which the court relied was, according to Petitioners, taken out of context and "[i]n fact, the paragraph in which the statement was made was prefaced by '[e]ven assuming arguendo ...'."

A reading of the paragraph at issue clearly evidences that Fifth Circuit's holding was not based on a quote taken out of context and that Petitioners indeed conceded that probable cause existed at the moment of the stop. The relevant portion of Petitioners' brief upon which the Fifth Circuit relied is as follows:

> Even assuming arguendo that plaintiffs did not raise a genuine material issue of fact, the Court erroneously held that probable cause existed for Lockett's arrest for reckless driving as a matter of law. "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Refendi v. Miller*, 203 F.3d 902, 903 (5th Cir. 2000). Here, the facts and circumstances known to the officers at the moment of the traffic stop did not give rise to probable cause for an arrest. **At the moment of the traffic stop, Bieber and Arceneaux arguably had probable cause to stop Lockett for careless driving.**

(emphasis added). The Fifth Circuit pointed out that in his brief Lockett did not challenge the probable cause the officers had to make the traffic stop based on his speeding. Instead, Lockett asserted that probable cause for a traffic stop is separate and distinct from the probable cause necessary to affect an arrest when the initial probable cause for the traffic stop is insufficient for the arrest.

Applying the principles of *Atwater v. City of Lago Vista*, *supra*, the Fifth Circuit correctly held that because the Defendants had probable cause to believe that Lockett had been driving in violation of the speed limit, the arrest did not violate a clearly established constitutional right.

REASONS FOR DENYING THE PETITION

Petitioners present no compelling reasons for their Petition for a Writ of Certiorari to be granted. The Fifth Circuit rendered an opinion wholly consistent with the usual course of judicial proceedings and *stare decisis* on the issues presented in this case.

Qualified Immunity

In *Hunter v. Bryant*, 502 U.S. 224, 228, (1991), this Court made clear that the question of qualified immunity was a question for the court, and not the trier of fact. Qualified immunity "protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only for 'transgressing bright lines.'"

Short v. Smoot, 436 F.3d 422, 426 (4th Cir. 2006) (citing *Maciariello v. Summer*, 973 F.2d 295, 298 (4th Cir. 1992)).[1]

In a § 1983 action for civil damages, in order to overcome the defense of qualified immunity afforded a governmental official performing discretionary functions, the plaintiff is required to show that the official violated clearly established statutory or constitutional rights of which a reasonable person would know. *Conn v. Gabbert*, 526 U.S. 286, 290 (1999) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Under the standard established in *Harlow v. Fitzgerald*, Petitioners may not rebut a defense of qualified immunity by presenting evidence that the defendants' conduct was "malicious or otherwise improperly motivated." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). Evidence concerning the defendants' subjective intent is simply irrelevant to a qualified immunity defense. *Id.*

Recently, this Court in *Brosseau v. Haugen*, 543 U.S. 194 (2004), admonished the Ninth Circuit Court of Appeals for misapplying the qualified immunity standard and reemphasized the standard to be applied in all cases. This Court reaffirmed that "[q]ualified

1. Qualified immunity is also available for public officials in actions for racial discrimination brought pursuant to 42 U.S.C. § 1981. *Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 996 n.21 (5th Cir. 1994). In addition, conspiracy claims under 42 U.S.C. § 1985 are also subject to qualified immunity. *See Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 533 (10th Cir. 2001) (held plaintiff's conclusory allegations of conspiracy were insufficient to overcome the defendant's qualified immunity defense.)

immunity shields an officer from suit when [he] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he] confronted." *Id.* at 198 (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001) ("qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force")). "Because the focus is on whether the officer had fair notice that her conduct was unlawful," this Court continued, "reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Id.* Thus, the relevant question the court must ask is whether, at the time of the officers' actions, it was clearly established that what he was doing violated the plaintiff's Fourth and Fourteenth Amendment rights. *Id.* at 199–201.

Question (1) Presented By Petitioners:

Whether, under this Court's decision of *Atwater v. City of Lago Vista*, qualified immunity may be afforded and 42 U.S.C. § 1983 false arrest and unlawful search and seizure claims arising out of an allegedly racially motivated traffic stop may be dismissed as a matter of law when the facts relevant to a probable cause determination are disputed.

Respondents' Reply:

There is no issue of fact relevant to whether the Defendants had probable cause to stop and ultimately

arrest Lockett for reckless driving. The Fifth Circuit correctly applied the principles of *Atwater v. City of Lago*, *supra*, and afforded the State Defendants immunity.

Petitioners have not, until now, challenged whether the officers had probable cause to make the traffic stop based upon Lockett's speeding. Their attempt to argue that Lockett did, and does, contest probable cause for the initial stop is not evidenced by the facts and previous arguments made in this case. It is undisputed that Lockett never denied that he was speeding. Petitioners' attempt to twist this reality by saying that "[i]t is undisputed that Lockett's testimony is that he was driving with the flow of traffic" is unpersuasive.

Further, Petitioners' assertion that a material fact exists as to whether the Defendants fabricated traffic violations in an attempt to justify a retaliatory arrest made as a result of his claim of race discrimination is unsupported. Contrary to the argument of counsel, there is no evidence in the record, except Lockett's self-serving testimony, that National Guardsmen Bieber and Arceneaux "fabricated" traffic violations. More importantly, precedent, "clearly dictates [that] subjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause to arrest, just as an officer's good intent is irrelevant when he contravenes settled law." *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000).

"[T]he determination of reasonable suspicion for an investigatory stop, or probable cause for arrest, does

not rest on the officer's subjective beliefs or attitudes, but turns on a completely objective evaluation of *all* the circumstances known to the officer at the time of the challenged action. *State v. Landry*, 98-0188, p. 2 (La. 1/20/99); 729 So. 2d 1019, 1020; *State v. Arnold*, 34,194 (La. App. 2 Cir. 12/6/00); 779 So. 2d 840, 845. When an officer observes what he objectively believes is a traffic offense, the decision to stop the vehicle is reasonable. *Whren v. U.S.*, 517 U.S. 806, 810 (1996).

The "constitutional torts" of false arrest, unreasonable seizure, and false imprisonment require a showing of no probable cause. *Mendenhall*, 213 F.3d 226, 230 (holding that qualified immunity protects government officials from a charge of wrongful arrest where a reasonable official would believe probable cause was present). For immunity to be lost, "there must not even 'arguably' be probable cause for the arrest." *Hart v. O'Brien*, 127 F.3d 424, 444 (5th Cir. 1997), *rev'd on other grounds, Kalina v. Fletcher*, 522 U.S. 118 (1997). That is, if a reasonable officer could have concluded that there was probable cause upon the facts then available to him, then an arrest would be constitutional. *Beck v. Ohio*, 379 U.S. 89 (1964). This case says nothing about qualified immunity, only about probable cause. More accurately: then the arrest does not violate the constitution. Because this arrest did not violate the constitutional rights of the accused, the officer is entitled to qualified immunity.

This Court summarized the definition of probable cause perfectly more than fifty years ago in *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) as follows:

> In dealing with probable cause, . . . as the very name implies, we deal with probabilities.

> These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . .
>
> The substance of all the definitions of probable cause is a reasonable ground for belief in guilt. And this means less than evidence which would justify condemnation or conviction. Probable cause exists where the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

(internal quotation marks and citations omitted). Further, the determination of probable cause, unlike the determination of guilt at trial, "does not require the final resolution of conflicting evidence" required at trial, and "credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief" that the person to be arrested has committed a crime. *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975).

In the instant case Bieber and Arceneaux witnessed Lockett commit multiple traffic violations in an area prevalent with youth pedestrian traffic. The perception of these officers was that they had probable cause to stop Lockett. Probable cause existed for Lockett's arrest and he has therefore failed to show that he was deprived of a constitutional right. "If an officer has probable cause to believe that an individual has

committed even a very minor criminal offense in his presence," even as minor as a seat belt violation, "he may, without violating the Fourth Amendment, arrest the offender." *Atwater*, 532 U.S. at 354.

Petitioner's assertion that an officer admitted that Lockett was detained because he called 911 is of no moment. Moreover, the Fifth Circuit found that it was Lockett's action in calling 911 that continued the duration of the initial stop. Lockett's involvement of the New Orleans Police Department ("NOPD") and his escalation of the incident required the Defendants' continued presence at the scene.

Further, the Fifth Circuit found that the duration of Lockett's stop was lengthened because Lockett failed to have current proof of insurance in his possession as required by Louisiana law and because Lockett made three phones calls during the stop: (1) to his insurance company in an attempt to obtain proof of insurance (which was unsuccessful); (2) to the 911 operator; and (3) to his wife requesting that she meet him at the scene. Further, the Fifth Circuit found that the transfer of custody of Lockett from the Louisiana National Guard to the NOPD added to the length of the detention. In light of these circumstances, the Fifth Circuit found that the length of the detention was not unreasonable.

Contrary to Petitioners' claim, the record is replete with evidence that the State Defendants' safety was a valid concern and that the searches of Lockett's person were reasonable given the totality of the circumstances. The District Court found that there was concern that Lockett initially identified himself as an FBI agent.

Regardless of whether this initial mis-identification was the result of a misunderstanding or confusion, the possibility that Lockett was improperly identifying himself as a law enforcement officer, especially at such an early stage of the stop, would clearly have been of some concern to the State Defendants vis-a-vis their safety.

The District Court found that this initial concern, combined with the failure of Lockett to provide proof of insurance, the multiple telephone calls Lockett made during the stop, and the escalating nature of the stop as described by both Arceneaux, who indicated that Lockett "was very worked up" and "might become angry to the point of combativeness," as well as by Lockett himself, who testified that when he called 911 "the situation look[ed] like it [was] getting out of hand," resulted in the State Defendants' reasonable concern for their safety, which in turn prompted the frisks. This was an unusual traffic stop and "[t]he reasonableness of a Fourth Amendment search depends on the circumstances under which the search was conducted." *United States v. Garcia*, 319 F.3d 726, 731 (5th Cir. 2003). Moreover, this Court has held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson*, 414 U.S. 218, 235 (1973).

"Qualified immunity allows for officers to make reasonable mistakes about whether their conduct violates the law, and an officer's mistake is reasonable when there are insufficient indicia that the conduct in

question was illegal." *Lytle v. Bexar County, Tex.*, 560 F3d 404, 410 (5th Cir. 2009). In this case, any mistake by the State Defendants in frisking Lockett was reasonable given the events of the stop and the uncertainty of the law regarding the permissible scope of probable cause traffic stops. Thus, the Fifth Circuit properly held that the State Defendants were entitled to qualified immunity as to Lockett's unconstitutional search claims.

Question (2) Presented By Petitioners:

Whether, under this Court's decision in *Atwater v. City of Lago Vista*, a state law false arrest claim arising out of alleged traffic violations may be dismissed as a matter of law absent a review of relevant state law.

Respondents' Reply:

The State Defendants were entitled to summary judgment as a matter of law and fact as to Lockett's state law claims of assault and battery. *See Gerard v. Parish of Jefferson*, 424 So. 2d 440, 444 (La. App. 5 Cir. 1982) ("A lawful arrest is a defense to the intentional tort of battery when reasonable force is used to effect such an arrest.") Likewise, Lockett's state law claims for false arrest, false imprisonment, and malicious abuse of process were properly dismissed by the District Court on the same qualified immunity basis as the civil rights claims.

"Under Louisiana law, the tort[ ] of false arrest . . . require[s] malice as an essential element." *Jenkins v. Baldwin*, 00-0802, p. 17 (La. App. 4 Cir. 8/29/01); 801 So.

2d 485, 497. "Malice may be inferred from a lack of probable cause, or from a finding that the defendant acted in reckless disregard of the other person's rights." *Id.*

The purported quoted language from the case of *Garrett v. City of Bossier City*, 792 So. 2d 24 (La. App. 2 Cir. 6/20/01), cited by Petitioners in support of their argument that the lower courts improperly dismissed Lockett's state law claims, is not found within the case. Moreover, *Garret* has no bearing on the analysis undertaken by the lower courts in dismissing Petitioners' state law claims. As discussed in the analysis of Lockett's federal claims, the present record does not support any showing of malice on the part of the defendants, and thus the defendants were entitled to summary judgment on these claims as well.

Question (3) Presented By Petitioners:

Whether the claim of excessive force under the Fourth Amendment is restricted to plaintiffs who demonstrate more than a de minimis injury and allege injury caused by more than handcuffing too tightly.

Respondents' Reply:

The findings of the Fifth Circuit with respect to Lockett's excessive force claim are not inconsistent with the rulings of this Court or the Fifth Circuit itself. Lockett bases his excessive force claim on injuries to his wrist and alleges that the multiple searches of his person constituted excessive use of force. To establish an excessive use of force claim, a plaintiff must demonstrate "(1) an injury (2) which resulted directly

and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (internal quotation marks omitted). Further, the "injury must be more than a *de minimis* injury and must be evaluated in the context in which the force was deployed." *Id.*

Lockett asserts that he sustained an injury to his wrists when Ahner affixed the handcuffs too tightly, causing him pain. The District Court disagreed and in its opinion quoted Lockett's own testimony to refute this allegation. Specifically, the Fifth Circuit's opinion highlighted Lockett's testimony wherein Lockett stated that, at one point, Arceneaux removed the handcuffs and allowed him to stretch his arms before putting the handcuffs back on in a much more appropriate way. The District Court further found that Lockett testified that after the handcuffs were placed back on, he was much more comfortable. Subsequently, NOPD Officer Gains took off the handcuffs belonging to the National Guard and replaced them with NOPD handcuffs. At that point, Lockett testified he was once again allowed to stretch his arms.

Further, the District Court and Fifth Circuit found that Lockett admitted that he did not complain to the Defendants about pain in his wrists while he was handcuffed, and the jail's medical intake screening form does not indicate that Lockett complained of pain. However, after being released Lockett and his wife met with Major Douget of the National Guard, and he complained that the handcuffs had hurt his wrist. Also, several days later, Lockett visited a physician,

complaining of pain in his wrists. The court's further highlighted Lockett's testimony wherein he stated that he was not currently under his physician's care for the wrist injury. Lockett's claim boils down to an allegation that the handcuffs were too tight.

Such a claim, without more, does not constitute excessive force: "handcuffing too tightly, without more, does not amount to excessive force." *Glenn*, 242 F.3d at 314; *see also Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir. 2007) (rejecting as *de minimis* the plaintiff's claim that the deputies twisted her arms behind her back while handcuffing her, jerked her around while she was cuffed, and applied the handcuffs too tightly, causing bruises and marks on her wrists and arms). In the instant case, there has been no showing of malice, only Lockett's allegations that Bieber made a racial comment. The findings of the Fifth Circuit and its application of the principles espoused in *Glenn* are sound and should not be revisited by this Court.

Lockett also contends that the Defendants' multiple searches of his person constitute excessive use of force. However, Lockett failed to allege an injury resulting from the pat downs. Moreover, the Fifth Circuit found that Lockett's deposition testimony completely undermined his claim that the searches constituted excessive use of force. Specifically, the Fifth Circuit's opinion provides as follows: When Lockett was asked "[d]o you think there was anything inappropriate in the way [Bieber] searched you?" he responded: "No. It seemed like a standard search to me." Lockett also testified that Arceneaux searched him "[a]ppropriately." With respect to Ahner's search of his person, Lockett testified that

Ahner's pat down was similar in manner to the previous two pat downs. Lockett further testified that when he was transferred to the custody of the NOPD, Officer Gains performed a "[g]eneral pat down."

In light of the above testimony and the lack of a "more than *de minimis* injury," Lockett has failed to make a claim of excessive use of force with respect to the pat downs. Thus, the Defendants were properly afforded qualified immunity with respect Lockett's claim of excessive use of force.

Question (4) Presented By Petitioners:

Whether claims asserted under 42 U.S.C. §§ 1985 and 1986 alleging discriminatory animus and facts in support thereof may be dismissed for lack of discriminatory animus as a matter of law absent a factual determination of discriminatory animus by a trier of fact.

Respondents' Reply:

Section 1985(3) prohibits, among other things, conspiracies to deprive any person equal protection of the laws. To state a claim under § 1985(3), a plaintiff must allege facts demonstrating (1) a conspiracy; (2) for the purpose of depriving a person of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or a deprivation of any right or privilege of a citizen of the United States. *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994). Additionally, the conspiracy must also have a racially based animus. *Id.* at 653.

Lockett asserts that the Defendants conspired to deprive him of his constitutional rights based on his race and that the Fifth Circuit erred because he created a genuine issue of fact with respect to this claim. Lockett points to the following statement Bieber made to Lockett: "You need to go to SUNO." From this short statement, Lockett testified that he understood Bieber meant that: "SUNO being an African-American university and him telling me that I need to go there as a substandard school that obviously he was insinuating that an African-American school was a substandard school."

Both the District Court and the Fifth Circuit held that Bieber's statement as alleged by Lockett does not demonstrate the racial animus needed to raise a genuine issue of material fact. This conclusion was supported by the undisputed fact that, although the driveway upon which the traffic stop occurred lead both to the FBI building and SUNO, when Lockett told Bieber he was going to class, Bieber assumed Lockett meant he was in training with the FBI—not SUNO. Moreover, as set forth above, the Defendants had probable cause to stop and arrest Lockett. He was not detained for an unreasonable length of time and the Defendants' patdown searches of him have not been shown to have violated clearly established rights. Indeed, Lockett's deposition testimony describing the Defendants' treatment of him during the searches (and adjustment of his handcuffs) undermine any allegation of an act intended to injure him.

Further, there is no evidence that Arceneaux commenced the stop because of Lockett's race. There is also no evidence that Arceneaux, Ahner and Fletcher

made or had any connection with the alleged "racially charge statement." Ahner and Fletcher were not even present when Bieber allegedly stated "you need to go to SUNO."

The absence of any evidence of racial animus defeats a § 1985(3) claim. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). In this case, Petitioners have not produced evidence of racial animus attributable to Arceneaux, Ahner, or Fletcher, and thus Lockett cannot demonstrate a conspiracy to deprive him of equal protection and the required act in furtherance of the conspiracy that caused injury or deprivation of any right.

CONCLUSION

The Fifth Circuit correctly affirmed the District Court's grant of summary judgment. As such, Petitioners Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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